

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-0106
Sales Tax
Responsible Officer
For the Tax Period 1999-2000

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ISSUE

1. Sales Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1(b), IC 6-2.5-2-1, IC 6-2.5-3-2, IC 6-2.5-3- 7, 45 IAC 2.2-8-12.

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales taxes.

II. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty

STATEMENT OF FACTS

The taxpayer was a fifty percent (50%) stockholder of a Subchapter S corporation that was audited for the tax period 1999-2000. As a result of the audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales taxes, interest, and penalty against the corporation. The corporation did not pay the assessment. The department then assessed the corporate sales tax, interest, and penalty personally against the taxpayer as a responsible officer of that corporation. The taxpayer protested a portion of the assessment of sales tax and penalty. A telephone hearing was held and this Letter of Findings results.

1. Sales Tax-Responsible Officer Liability

Discussion

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The taxpayer admits that he was a person with the duty to remit sales tax to the state. The taxpayer contends, however, that the amount of the assessment is too high. The corporation sold cigarettes. Retail merchants are required to collect and remit sales tax on retail sales of tangible personal property. IC 6-2.5-2-1. Indiana imposes a complimentary use tax on tangible personal property stored, used, or consumed in Indiana if it was purchased in a retail transaction and no sales tax was paid at the time of purchase. IC 6-2.5-3-2. There are certain statutory exemptions from the use tax. Retail merchants have the burden of proving that a particular item's use qualifies it for exemption from the use tax or receiving a properly completed form certifying that use of the purchased item is exempt from the use tax. The receipt of a properly completed exemption certificate transfers the burden of proving that the purchaser purchased the item for an exempt use from the retailer to the purchaser. IC 6-2.5-3-7.

The corporation did not collect and remit sales tax on sales to several customers because the taxpayer believed that those customers would use the cigarettes in a manner qualifying them for exemption from the Indiana use tax. At the time of the audit, the corporation could not produce evidence that the cigarettes were purchased for an exempt use. The corporation also did not have exemption certificates from the purchasers. The department gave the corporation the opportunity to obtain a properly executed "Special Sales/Use Tax Exemption Certificate," form AD-70, from each of the customers. The corporation submitted four certificates. One was not completed. Three were completely filled out including Registered Retail Merchant Nos. that properly identified the businesses. Of these three, one was signed by the company president, one was signed by a clerk, and one was signed by a manager. The corporation was only given credit in the audit for the certificate signed by the president. The law requires that the certificate be that it be filled out . . . "in the form prescribed by the department," . . . This requirement is further clarified at 45 IAC 2.2-8-12 as follows:

An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

The law, regulations, and blank on the form do not require that the signatory be an officer. Therefore, the three completed forms meet the department's guidelines to exempt the sales from assessment. Therefore the corporation's sales tax assessment must be corrected to reflect the two

additional certificates. As a responsible officer, the taxpayer is only liable for the actual sales tax liability.

Finding

The taxpayer's protest is sustained to the extent that tax was assessed on sales made to the customers who completed a "Special Sales/Use Tax Exemption Certificate" and the certificate was signed by the manager or clerk.

I. Tax Administration- Ten Per Cent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer did not fulfill his statutory duty to assure that the corporation collected and remitted the proper amount of sales tax to the state. This failure to follow the department's instructions in this matter constitutes negligence.

FINDING

The taxpayer's protest is denied.